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United Nations Commission on International Trade Law
Working Group III (Online Dispute Resolution)
Twenty-ninth session
New York, 24-28 March 2014

Annotated provisional agenda

I. Provisional agenda

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Preparation of legal standards on online dispute resolution.
5. Other business.
6. Adoption of the report.

II. Composition of the Working Group

1. The Working Group is composed of all States members of the Commission, which are the following: Algeria (2016), Argentina (2016), Armenia (2019), Australia (2016), Austria (2016), Belarus (2016), Botswana (2016), Brazil (2016), Bulgaria (2019), Cameroon (2019), Canada (2019), China (2019), Colombia (2016), Côte d'Ivoire (2019), Croatia (2016), Denmark (2019), Ecuador (2019), El Salvador (2019), Fiji (2016), France (2019), Gabon (2016), Georgia (2015), Germany (2019), Greece (2019), Honduras (2019), Hungary (2019), India (2016), Indonesia (2019), Iran (Islamic Republic of) (2016), Israel (2016), Italy (2016), Japan (2019), Jordan (2016), Kenya (2016), Kuwait (2019), Liberia (2019), Malaysia (2019), Mauritania (2019), Mauritius (2016), Mexico (2019), Namibia (2019), Nigeria (2016), Pakistan (2016), Panama (2019), Paraguay (2016), Philippines (2016), Republic of Korea (2019), Russian Federation (2019), Sierra Leone (2019), Singapore (2019), Spain (2016), Switzerland (2019), Thailand (2016), Turkey (2016), Uganda (2016), Ukraine (2014), United Kingdom of Great Britain and Northern Ireland (2019),

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United States of America (2016), Venezuela (Bolivarian Republic of) (2016) and Zambia (2019).

2. States not members of the Commission and international governmental organizations may attend the session as observers and participate in the deliberations. In addition, invited international non-governmental organizations may attend the session as observers and represent the views of their organizations on matters where the organization concerned has expertise or international experience so as to facilitate the deliberations at the session.

III. Annotations to agenda items

Item 1. Opening of the session

3. The twenty-ninth session of the Working Group will be held at the United Nations Headquarters, New York, from 24 to 28 March 2014. Meeting hours will be from 10:00 a.m. to 1:00 p.m. and from 3:00 p.m. to 6:00 p.m., except on Monday, 24 March 2013, when the session will be opened at 10:30 a.m.

Item 2. Election of officers

4. In accordance with its practice at previous sessions, the Working Group may wish to elect a Chairman and a Rapporteur.

Item 4. Preparation of legal standards on online dispute resolution

(a) Previous deliberations

5. At its thirty-third session (New York, 12 June-7 July 2000), the Commission held a preliminary exchange of views on proposals regarding future work, including in the fields of electronic commerce and arbitration.[1] At that session, it was generally agreed that further work could be undertaken to determine whether specific rules were needed to facilitate the increased use of online dispute settlement mechanisms. In that context, it was suggested that special attention might be given to the ways in which dispute settlement techniques such as arbitration and conciliation might be made available to both commercial parties and consumers. It was widely felt that the use of electronic commerce tended to blur the distinction between consumers and commercial parties. It was also recalled that in a number of countries, the use of arbitration for the settlement of consumer disputes was restricted for reasons involving public policy considerations and might not easily lend itself to harmonization by international organizations. At its thirty-fourth[2] (Vienna, 25 June-13 July 2001) and thirty-fifth[3] (New York, 17-28 June 2002) sessions, the Commission decided that future work on electronic commerce would include further research and studies on the question of online dispute resolution and that Working Group II (Arbitration and Conciliation) would cooperate with Working Group IV (Electronic Commerce) with respect to possible future work in that area.

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[1] *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 17* (A/55/17), para. 385.

[2] Ibid., *Fifty-sixth Session, Supplement No. 17* (A/56/17), paras. 287 and 311.

[3] Ibid., *Fifty-seventh Session, Supplement No. 17* (A/57/17), paras. 180 and 205.

6. At its thirty-ninth (New York, 19 June-7 July 2006) to forty-first (New York, 16 June-3 July 2008) sessions, the Commission took note of suggestions that the issue of online dispute resolution should be maintained as an item for future work.[4]

7. At its forty-second session (Vienna, 29 June-17 July 2009), the Commission heard a recommendation that a study should be prepared on possible future work on the subject of online dispute resolution in cross-border electronic commerce transactions, with a view to addressing the types of e-commerce disputes that might be solved by online dispute resolution systems, the appropriateness of drafting procedural rules for online dispute resolution, the possibility or desirability to maintain a single database of certified online dispute resolution providers, and the issue of enforcement of awards made through the online dispute resolution process under the relevant international conventions.[5] The Commission had agreed on the importance of the proposals relating to future work in the field of online dispute resolution to promote electronic commerce and requested the Secretariat to prepare a study on the basis of certain proposals[6] and to hold a colloquium on the issue of online dispute resolution, resources permitting.[7]

8. At its forty-third session (New York, 21 June-9 July 2010), the Commission noted that the goal of any work undertaken by UNCITRAL in this field should be to design generic rules which, consistent with the approach adopted in UNCITRAL instruments such as the Model Law on Electronic Commerce,[8] could apply in both business-to-business and business-to-consumer environments. The Commission was informed that the commonly shared view expressed during the colloquium was that traditional judicial mechanisms for legal recourse did not offer an adequate solution for cross-border electronic commerce disputes, and that the solution — providing a quick resolution and enforcement of disputes across borders — might reside in a global online dispute resolution system for small-value, high-volume business-to-business and business-to-consumer disputes. The Commission was generally of the view that topics identified at the colloquium required attention and that work by the Commission in the field of online dispute resolution would be timely.[9]

9. At that session, the Commission agreed that a Working Group should be established to undertake work in the field of online dispute resolution relating to cross-border electronic commerce transactions, including business-to-business and business-to-consumer transactions.[10] It was also agreed that the form of the legal standard to be prepared should be decided after further discussion of the topic.

10. At its forty-fourth session (Vienna, 27 June-8 July 2011) the Commission reaffirmed the mandate of the Working Group to create a legal standard on

[4] *Official Records of the General Assembly, Sixty-first Session, Supplement No. 17* (A/61/17), paras. 183 and 186-187; *Sixty-second Session, Supplement No. 17* (A/62/17 (Part I)), para. 177; and *Sixty-third Session, Supplement No. 17* (A/63/17), para. 316.

[5] Ibid., *Sixty-fourth Session, Supplement No. 17* (A/64/17), para. 338, and A/CN.9/681/Add.2, para. 4.

[6] As contained in document A/CN.9/681/Add.2.

[7] Ibid., *Sixty-fourth Session, Supplement No. 17* (A/64/17), paras. 342-343.

[8] United Nations publication, Sales No. E.99.V.4.

[9] *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17* (A/65/17), paras. 252-256.

[10] Ibid., *Sixty-fifth Session, Supplement No. 17* (A/65/17), para. 257.

online dispute resolution for cross-border electronic transactions, including business-to-business and business-to-consumer transactions. The Commission decided that, while the Working Group should be free to interpret that mandate as covering consumer-to-consumer transactions and to elaborate possible rules governing consumer-to-consumer relationships where necessary, it should be particularly mindful of the need not to displace consumer protection legislation.[11]

11. At its forty-fifth session (25 June-6 July 2012) the Commission decided that:

(a) The Working Group should consider and report back at a future session of the Commission on how the draft rules would respond to the needs of developing countries and those facing post-conflict situations, in particular with regard to the need for an arbitration phase to be part of the process;

(b) The Working Group should continue to include in its deliberations the effects of online dispute resolution on consumer protection in developing and developed countries and countries in post-conflict situations, including in cases where the consumer was the respondent party in an online dispute resolution process;

(c) The Working Group should continue to explore a range of means of ensuring that online dispute resolution outcomes were effectively implemented, including arbitration and possible alternatives to arbitration;

(d) The mandate of the Working Group on online dispute resolution in respect of low-value, high-volume cross-border electronic transactions was reaffirmed, and the Working Group was encouraged to continue to conduct its work in the most efficient manner possible.[12]

12. At its forty-sixth session (Vienna, 8-26 July 2013), the Commission unanimously confirmed that decision made at its forty-fifth session and set out in paragraph 11 above.[13]

13. At its twenty-second session (Vienna, 13-17 December 2010), Working Group III commenced its work on the preparation of a legal standard on online dispute resolution for cross-border electronic transactions (A/CN.9/WG.III/WP.105). The Working Group requested at that session that the Secretariat prepare draft generic procedural rules for a future session for the consideration of the Working Group (A/CN.9/716, para. 115(a)).

14. At its twenty-third (New York, 23-27 May 2011) through twenty-eighth (Vienna, 18-22 November 2013) sessions, the Working Group continued its work on the preparation of draft procedural rules for online dispute resolution for cross-border electronic transactions on the basis of notes prepared by the Secretariat (A/CN.9/WG.III/WP.107, A/CN.9/WG.III/WP.109, A/CN.9/WG.III/WP.112 and its addendum, A/CN.9/WG.III/WP.117 and its addendum, A/CN.9/WG.III/WP.119 and its addendum, A/CN.9/WG.III/WP.123 and its addendum).

[11] Ibid., *Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 218.
[12] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), under preparation.
[13] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), under preparation.

15. At its twenty-ninth session (New York, 24-28 March 2014), the Working Group is expected to continue its work on the preparation of draft procedural rules for online dispute resolution for cross-border electronic transactions.

(b) Documentation

16. The Working Group will have before it a note by the Secretariat regarding the preparation of legal standards on online dispute resolution for cross-border electronic transactions: draft procedural rules (A/CN.9/WG.III/WP.127 and its addendum) as well as a note in relation to draft guidelines for stakeholders in the ODR process (A/CN.9/WG.III/WP.128).

17. A limited number of the following background documents will be made available at the session:

Reports of the United Nations Commission on International Trade Law on the work of its forty-third session (*Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17* (A/65/17)); forty-fourth session (*Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17* (A/66/17)); forty-fifth session (*Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 17* (A/67/17)); and forty-sixth session (*Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17* (A/68/17));

Report of the Working Group III (Online Dispute Resolution) on the work of its twenty-second session (A/CN.9/716);

Report of the Working Group III (Online Dispute Resolution) on the work of its twenty-third session (A/CN.9/721);

Report of the Working Group III (Online Dispute Resolution) on the work of its twenty-fourth session (A/CN.9/739);

Report of the Working Group III (Online Dispute Resolution) on the work of its twenty-fifth session (A/CN.9/744);

Report of the Working Group III (Online Dispute Resolution) on the work of its twenty-sixth session (A/CN.9/762);

Report of the Working Group III (Online Dispute Resolution) on the work of its twenty-seventh session (A/CN.9/769);

Report of the Working Group III (Online Dispute Resolution) on the work of its twenty-eighth session (A/CN.9/795);

Online dispute resolution for cross-border electronic commerce transactions: draft procedural rules and notes by the Secretariat (A/CN.9/WG.III/WP.123 and its addendum; A/CN.9/WG.III/WP.124).

18. Relevant UNCITRAL documents are posted on the UNCITRAL website (www.uncitral.org) upon their issuance in all the official languages of the United Nations. Delegates may wish to check the availability of the documents by accessing the Working Group's page in the "Working Groups" section of the UNCITRAL website.

19. The Working Group may wish to consider reviewing the guidance from the Commission regarding the future deliberations of the Working Group as set out in Section VII of the Report of the United Nations Commission on International Trade Law on the work of its forty-sixth session (*Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17* (A/68/17)).

Item 6. Adoption of the report

20. The Working Group may wish to adopt, at the close of its session, a report for submission to the forty-seventh session of the Commission scheduled to be held in New York, from 7 to 25 July 2014. The main conclusions reached by the Working Group at its ninth meeting (on Friday morning) will be summarily read out for the record at the tenth meeting and subsequently incorporated into the report.

IV. Scheduling of meetings

21. The Working Group's twenty-ninth session will last for five working days. There will be ten half-day meetings available for consideration of the agenda items. The Working Group may wish to note that, consistent with decisions taken by the Commission at its thirty-fourth session,[14] the Working Group is expected to hold substantive deliberations during the first nine half-day meetings (that is, from Monday to Friday morning), with a draft report on the entire period being prepared by the Secretariat for adoption at the tenth and last meeting of the Working Group (on Friday afternoon).

22. The Working Group may wish to note that its thirtieth session is tentatively scheduled to be held in Vienna from 20-24 October 2014.

[14] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 17* and corrigendum (A/56/17 and Corr.3), para. 381.

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Working Group III (Online dispute resolution)
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New York, 24-28 March 2014

Online dispute resolution for cross-border electronic commerce transactions: draft procedural rules

Note by the Secretariat

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I. Introduction

1. At its forty-third session (New York, 21 June-9 July 2010), the Commission agreed that a Working Group should be established to undertake work in the field of online dispute resolution (ODR) relating to cross-border electronic commerce transactions, including business-to-business (B2B) and business-to-consumer (B2C) transactions.[1] At its forty-fourth (Vienna, 27 June-8 July 2011)[2] and forty-fifth (New York, 25 June-6 July 2012)[3] sessions, the Commission reaffirmed the mandate of the Working Group on ODR relating to cross-border electronic transactions, including B2B and B2C transactions.

2. At its twenty-second session (Vienna, 13-17 December 2010),[4] the Working Group commenced its consideration of the topic of ODR and requested that the Secretariat prepare draft generic procedural rules for ODR (the "Rules"), taking into account that the types of claims the Rules would address should be B2B and B2C, cross-border, low-value, high-volume transactions.[5] From its twenty-third (New York, 23-27 May 2011)[6] to twenty-eighth (Vienna, 18-22 November 2013)[7] sessions, the Working Group has considered the content of the Rules.

3. At its twenty-sixth session (Vienna, 5-9 November 2012), the Working Group identified that two tracks in the Rules might be required in order to accommodate jurisdictions in which agreements to arbitrate concluded prior to a dispute ("pre-dispute arbitration agreements") are considered binding on consumers, as well as jurisdictions where pre-dispute arbitration agreements are not considered binding on consumers (A/CN.9/762, paras. 13-25, and annex).

4. At its twenty-eighth session (Vienna, 18-22 November 2013), the Working Group proceeded to consider the draft text of the track of the Rules that did not end in a binding arbitration phase ("Track II").[8]

II. Online dispute resolution for cross-border electronic commerce transactions: draft procedural rules

A. General remarks

Drafting matters

5. The Working Group may wish to note that the order of the provisions of Track II of the Rules as contained in this note has been modified slightly from its

[1] *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17* (A/65/17), para. 257

[2] Ibid., *Sixty-sixth Session, Supplement No. 17* (A/66/17).

[3] Ibid., *Sixty-seventh Session, Supplement No. 17* (A/67/17).

[4] The report on the work of the Working Group at its twenty-second session is contained in document A/CN.9/716.

[5] A/CN.9/716, para. 115.

[6] The report on the work of the Working Group at its twenty-third session is contained in document A/CN.9/721.

[7] The report on the work of the Working Group at its twenty-eighth session is contained in document A/CN.9/795.

[8] A/CN.9/795, para. 21.

previous iteration, in order to reflect better the flow of proceedings and to increase clarity in timelines as well as the commencement of different stages of proceedings.

6. The Working Group may wish to consider whether the definition, and use of the terms "communication" and "electronic communication" in the Rules, as set out in draft article 2(7), accurately capture the intended meaning of the provisions to which those terms are relevant — namely, that all communications in the course of ODR proceedings must be submitted electronically. In that respect, the Working Group may wish to consider whether there would ever be exceptional circumstances that would warrant reverting to paper or hard copy means of communication.

7. The terms, which were used interchangeably throughout the Rules, have been consolidated in option 1 of draft article 2(7) and the use of the term "communication" throughout the Rules has also been made consistent, and reflects the definition set out in that option.[9]

8. The Working Group may also wish to note that referring to a "transaction" and "agreements made at the time of transaction" in the preamble and in article 1 may create ambiguity as to the nature of the relationship between parties to a dispute. In that respect, the Working Group may wish to consider whether a contractual relationship will in practice exist, or ought as a matter of policy to exist, as between the parties to a dispute, and if so whether it is desirable to use terminology such as "contract" in the Rules to describe that relationship.

9. Finally, the Working Group requested that the term "electronic address" in articles 3 and 4 be reconsidered and more clearly phrased. In that respect, the Working Group may wish to have regard to the guidance set out at paragraph 185 of the explanatory note by the UNCITRAL secretariat on the United Nations Convention on the Use of Electronic Communications in International Contracts (the "Electronic Communications Convention"), in relation to that term: "... the term 'electronic address' ... appears in other international instruments such as the Uniform Customs and Practices for Documentary Credits ('UCP 500') Supplement for Electronic Presentation ('eUCP') ... Indeed, the term 'electronic address' may, depending on the technology used, refer to a communications network, and in other instances could include an electronic mailbox, a telecopy device or another specific 'portion or location in an information system that a person uses for receiving electronic messages'".

ODR provider, ODR platform and ODR administrator

10. The Working Group considered at its twenty-eighth session whether the Rules, which prescribed an ODR provider-led process by requiring all documents to go via an ODR provider (see, e.g., the definitions of those terms in draft article 2), accurately reflected the current practice of online dispute resolution, and the various possibilities for the process to be either provider-led or platform-led, or alternatively for the provider and the platform to be the same entity (A/CN.9/795, para. 51). The Working Group may wish to consider whether it is desirable for the Rules to refer to the relationship between the ODR provider and ODR platform (in the definitions

[9] The term "electronic communication" continues to be used in the preamble, and draft articles 1(1) and 2(1), because the term "communication" is only defined under option 1 in draft article 2(7).

section or otherwise), which, notwithstanding the current variety of practice, could further evolve with the development of the market, or whether a single term such as "ODR administrator" might allow for multiple modalities in terms of the relationship between an ODR platform and provider (see A/CN.9/795, paras. 48-56; see also A/CN.9/WG.III/WP.119, para. 22).

11. Having regard to that issue, the Working Group requested the Secretariat to prepare language that would define a single ODR entity for the purpose of the Rules (A/CN.9/795, para. 57). Such a definition has been inserted in draft article 2(3), as option 3.

12. At its twenty-eighth session, the Working Group further raised issues of liability in relation to the respective roles of ODR platform and provider, and specifically observed that it was important to be clear in the Rules which entity was responsible to whom, and for which part of the ODR proceedings (A/CN.9/795, para. 53). The Working Group may wish to consider whether it is the role of procedural rules to create obligations and clear lines of liability for the underlying entities, or whether the Rules ought rather to create a clear procedure directed toward end-users of the Rules.

13. Consequential amendments, including in articles 3, 4, 6, 7, 9, 10 and 12, would be required following any decision in that respect.

"Final and binding"

14. The Working Group considered at its twenty-eighth session whether Track II constituted a dispute resolution process with a "final and binding" outcome. (A/CN.9/795, paras. 75-80).

15. In that respect, the Working Group may wish to differentiate between: (i) the legal effect of an agreement to submit disputes to a Track II ODR proceeding; and (ii) the legal effect on the parties of a recommendation arising out of that proceeding.

(i) Legal effect of an agreement to submit disputes to a Track II ODR proceeding

16. In relation to the legal effect of an agreement to submit disputes to a Track II ODR proceeding, draft article 1 of the Rules provides for explicit agreement between the parties to submit disputes to ODR, and consequently for a clear (and binding) contractual basis for those proceedings. The Working Group may wish to consider whether Option II of article 4A, paragraph (3), undermines that agreement — essentially by requiring a one-sided "second click", or a second agreement by the respondent, taking place post-dispute (see A/CN.9/WP119, paras. 8 and 12).

17. In addition, the Working Group may wish to consider whether the effect of entering into Track II ODR proceedings ought to prevent a party from seeking judicial or arbitral remedies while Track II ODR proceedings are underway (see draft article 4A, paragraph (4)(e), and its counterpart provision in draft article 4B). If so, the Working Group may wish to consider including an undertaking in the Rules to that effect (see UNCITRAL Conciliation Rules 1980, article 16).

18. In that respect, and for the avoidance of doubt, the Working Group may wish to consider whether a party ought to be able to withdraw from Track II ODR proceedings before a recommendation is issued, and if so, whether there ought to be

a clear provision for a party to express its withdrawal from Track II ODR proceedings at any time during proceedings. The Working Group might wish to consider that a right to withdraw from Track II proceedings would accrue to both parties to a dispute, not just a claimant.

(ii) Legal effect on the parties of a recommendation arising out of that proceeding

19. In relation to the legal effect on the parties of a recommendation arising out of that proceeding, draft article 7(4) currently states that a recommendation is not binding on the parties unless they otherwise agree. The Working Group may wish to consider differentiating between the desirability of an outcome that has consequences (e.g. a chargeback implemented on the basis of a recommendation), and a "final and binding" outcome. A recommendation that is enforced via a "private enforcement mechanism" seeks to encourage compliance with decisions, or to provide an execution mechanism for a decision, but may itself be subject to final enforcement in national courts (see A/CN.9/WG.III/WP.124, para. 5).

Guidelines

20. At its twenty-eighth session, the Working Group requested the Secretariat to draft preliminary guidelines that would indicate elements of the Rules better directed toward ODR providers and platforms than contained in procedural rules. Background and proposed content for those guidelines is contained in document A/CN.9/WG.III/WP.128, which may provide a useful reference point for assessing the Rules, and determining whether any content currently in the Rules might be better placed in those guidelines.

21. The Working Group may wish to note that the Rules provide a procedural framework for the resolution of disputes between purchasers and merchants. The neutral and ODR provider are part of that procedural framework, and consequently the rights and obligations of, and powers conferred on those entities as set out in the Rules, apply to those entities by virtue of their participation in the Rules-based process.

D. Notes on draft procedural rules

22. The following preamble and articles 1-16 contained in this document and in document A/CN.9/WG.III/WP.127/Add.1 pertain only to Track II of the draft Rules.

1. Introductory rules

23. Draft preamble

"1. The UNCITRAL online dispute resolution rules ("the Rules") are intended for use in the context of disputes arising out of cross-border, low-value transactions conducted by means of electronic communication.

"2. The Rules are intended for use in conjunction with an online dispute resolution framework that consists of the following documents [which are attached to the Rules as an Appendix]:

["(a) Guidelines and minimum requirements for online dispute resolution providers/platforms/administrators;]

["(b) Guidelines and minimum requirements for neutrals;]

["(c) Substantive legal principles for resolving disputes;]

["(d) Cross-border enforcement mechanism;]

["...];"

Remarks

Paragraph (1)

24. The term "high-volume" no longer appears in the preamble, following a decision of the Working Group at its twenty-eighth session to delete it (A/CN.9/795, para. 24; see also A/CN.9/WG.III/WP.123, para. 12).

25. The meaning and usage of the phrase "low-value", both in relation to paragraph (1) of the preamble as well as in article 1(1), remains a matter for the further consideration of the Working Group (A/CN.9/795, paras. 25-27; 31-32). The Working Group considered at its twenty-fourth session that a definition for that phrase ought not to be included in the Rules, but indicative information set out in guidelines (A/CN.9/795, paras. 25-6; A/CN.9/739, para. 16). The Working Group may wish to have regard to document A/CN.9/WG.III/WP.128 in that respect.

26. The phrasing of paragraph (1) has also been slightly modified to reflect the fact that the Rules are intended for use in the context of "disputes arising out of" cross-border, low-value transactions.

Paragraph (2)

27. At its twenty-eighth session, the Working Group agreed to delete a paragraph in the preamble that referred to separate and supplemental rules or documents, on the basis that such a reference might be confusing (A/CN.9/795, para. 29).

28. Words indicating that the documents listed in paragraph (2) "form part of the Rules" have been deleted, as the legal nature, and addressees, of the Rules differ from those of the ancillary documents listed in paragraph (2). For the same reasons, and as set out in document A/CN.9/WG.III/WP.128, it might be advisable not to attach the documents currently listed in paragraph (2) of the preamble to the Rules as an Appendix.

29. **Draft article 1 (Scope of application)**

"1. The Rules shall apply where the parties to a transaction conducted by use of electronic communication have explicitly agreed that disputes relating to that transaction and falling within the scope of the Rules shall be resolved under the Rules.

["1 bis. Explicit agreement referred to in paragraph (1) above requires agreement separate from that transaction[, and] notice in plain language to the buyer that disputes relating to the transaction and falling within the scope of the Rules will be resolved through ODR proceedings under the Rules [and whether Track I or Track II of the Rules apply to that dispute] (the 'dispute resolution clause')].

"2. These Rules shall only apply to claims:

["(a) that goods sold or services rendered were not delivered, not timely delivered, not properly charged or debited, and/or not provided in conformity with the agreement made at the time of the transaction; or

"(b) that full payment was not received for goods or services provided.]

"3. These Rules shall govern the ODR proceedings except that where any of these Rules is in conflict with a provision of applicable law from which the parties cannot derogate, that provision shall prevail."

Remarks

General

30. The Working Group may wish to consider whether to include a time period in article 1, in order to link the time for bringing an online claim to (i) a certain time after the goods or services have been paid for or delivered; or (ii) a certain time after the alleged breach.[10] In the alternative, guidelines might set out a suggested period in which claims could be brought in the online system.

31. Although procedural rules would typically not prescribe a limitation period, but would rather rely on national law to do so, the Working Group may wish to consider whether the Rules or guidelines should prescribe such a period in order to provide for procedural clarity for parties as well as ODR administrators. Such a period would not affect or override any period for bringing claims specified in national law.

Paragraph (1)

32. The Working Group may wish to consider whether the term "transaction conducted by use of electronic communications" is sufficiently clear, or whether clarifying further by replacing that phrase with "contract concluded or performed using electronic communications", might be clearer (see para. 8 above).

Paragraph (1)(bis)

33. At its twenty-eighth session, the Working Group considered whether paragraph (1)(bis) might relate more appropriately to Track I proceedings, rather than to simplified Track II proceedings (A/CN.9/795, para. 34). The Working Group may wish to consider whether a link exists between paragraph (1)(bis) and any declaration in relation to the pursuit of other remedies, under article 4(A), paragraph (4)(e) (see paras. 17-18 above).

[10] The United Nations Convention on the Limitation Period in the International Sale of Goods (1974), which does not apply to sales of goods for personal or household use, sets out principles for prescription periods based on the date on which the claim accrues (article 9).

Paragraph (2)

34. The Working Group agreed at its twenty-eighth session that the Rules ought to include an exhaustive list of the type of claims that may be brought (currently contained in paragraph (2)(a)) (see A/CN.9/795, para. 37). The words "or leased" in that list have been deleted on the basis that leasing claims might involve complex issues (for example, damage to leased goods) that are likely to fall outside the scope of the Rules.

35. The Working Group may wish to note that the term "in conformity with the agreement made at the time of transaction" in subparagraph (a) has been inserted in replacement of the term "in accordance with the agreement ..." to accord more closely with the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) ("CISG"), and pursuant to the request of the Working Group to replace the phrase "in accordance with the agreement" (A/CN.9/795, para. 42).

36. Although the CISG does not apply to consumer contracts, the Working Group may wish to have regard to two additional elements of the CISG and their relationship to this provision. First, although the CISG does not use the term "timely delivery" (currently included in subparagraph (a)), the term "timely" is sometimes used to encompass the delivery requirements of article 33 of the CISG. Second, in relation to subparagraph (b), the Working Group may wish to note that the CISG gives the buyer two obligations under article 53: "The buyer must pay the price for the goods and take delivery of them as required by the contract and this Convention."[11] In other words, payment and taking delivery are treated independently (see articles 54-60 CISG). Moreover, article 31 CISG requires the seller to "hand over any documents relating to [the goods]".

37. The Working Group may wish to consider whether a similar approach ought to be taken in relation to paragraph (2). In that respect, the Working Group may wish to consider amending paragraph (2)(a) as follows: "that goods sold or services rendered were not delivered, not timely delivered, not properly charged or debited, not provided in conformity with the agreement made at the time of transaction, and/or that documents related to the goods were not provided"; and amending paragraph (2)(b) as follows "that full payment was not received for goods or services provided and/or the purchaser did not take delivery of the goods".

38. **Draft article 2 (Definitions)**

"For purposes of these Rules:

ODR

"1. 'ODR' means online dispute resolution which is a mechanism for resolving disputes facilitated through the use of electronic communications and other information and communication technology.

[11] See, e.g., UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods, 2012 Edition, Article 33, paras. 6, 8, 9, available from www.uncitral.org/uncitral/en/case_law/digests.html.

Option 1:

"2. 'ODR platform' means an online dispute resolution platform which is a system for generating, sending, receiving, storing, exchanging or otherwise processing electronic communications used in ODR, and which is designated by the ODR provider in the ODR proceedings.

"3. 'ODR provider' means the online dispute resolution provider specified in the dispute resolution clause. An ODR provider is an entity that administers ODR proceedings [and designates an ODR platform][, whether or not it maintains an ODR platform].

Option 2:

"2. 'ODR platform' means the entity specified in the dispute resolution clause that supplies a system for generating, sending, receiving, storing, exchanging or otherwise processing electronic communications used in ODR.

"3. 'ODR provider' means the entity that administers ODR proceedings agreed upon by the parties; and should be specified in the dispute resolution clause if the specific ODR provider is known at the time of transaction.

Option 3:

"2. 'ODR administrator' means the entity specified in the dispute resolution clause that administers and coordinates ODR proceedings.

Parties

"4. 'Claimant' means any party initiating ODR proceedings under the Rules by issuing a notice.

"5. 'Respondent' means any party to whom the notice is directed.

Neutral

"6. 'Neutral' means an individual that assists the parties in settling or resolving the dispute.

Communication

Option 1

"7. 'Communication' for the purposes of these Rules means any communication (including a statement, declaration, demand, notice, response, submission, notification or request) made by means of information generated, sent, received or stored by electronic, magnetic, optical or similar means.

Option 2

"7. 'Communication' means any statement, declaration, demand, notice, response, submission, notification or request made by any person to whom the Rules apply in connection with ODR.

"8. 'Electronic communication' means any communication made by any person to whom the Rules apply by means of information generated, sent, received or stored by electronic, magnetic, optical or similar means [including, but not limited to, electronic data interchange (EDI), electronic mail, telecopy, short message services (SMS), web-conferences, online chats,

Internet forums, or microblogging] and includes any information in analogue form such as document objects, images, texts and sounds that are converted or transformed into an electronic format so as to be directly processed by a computer or other electronic devices."

Remarks

Paragraphs (2) and (3)

39. Three options have been included for the consideration of the Working Group, following agreement at its twenty-eighth session to consider further the role of ODR providers and platforms in practice, as well as the need for the Rules to distinguish between the roles of those two entities (see paras. 10-13 above).

Options 1 and 2

40. Options 1 and 2 define "ODR provider" and "ODR platform" separately, with the first option indicating that most systems will be provider-led, insofar as platforms would be designated by providers; the second option provides more neutral language in respect of the inter-relationship between platform and provider. The phrase "dispute resolution clause referring disputes to online dispute resolution under these Rules" has been replaced by "dispute resolution clause" in option 1, to retain consistency with the other options in relation to paragraphs (2) and (3).

41. The Working Group may wish to consider whether the Rules ought to distinguish between the roles of platform and provider: in short, whether such a designation is useful for the functioning of the Rules. If so, the Working Group may wish to consider whether options 1 or 2 adequately reflect the nature of the existing ODR systems and also provide for a potential evolution of ODR practice. If not, the Working Group may wish to consider whether option 3 provides a more streamlined approach that reduces the need to consider the mechanics of the underlying system within the Rules themselves.

Option 3

42. A third option has been included to define an "ODR administrator" — a single entity that would maintain full party-facing contact and responsibility for the administration of a dispute (see A/CN.9/795, paras. 56-57, and paras. 10-13 above). The definition indicates that that entity would "administer and coordinate" ODR proceedings, in order to account for the fact that such an entity might be a provider, platform, or both, but that for the purposes of the Rules, that entity would be the administrator of all services provided to the parties.

Specifying relevant entity in dispute resolution clause

43. The specification of the ODR provider, platform or administrator in the dispute resolution clause is also provided for (in square brackets) in draft article 9. The Working Group may wish to consider the value of identifying one or all of these entities at the time of the dispute resolution clause, and/or the time of the dispute arising, and when the different entities will be appointed. In that respect the Working Group may wish to consider whether, if an ODR platform identifies an ODR provider after the dispute has arisen, that would be problematic for the

purposes of transparency, and moreover whether the identification of the ODR platform in the dispute resolution clause would be useful to the disputing parties.

Paragraphs (7) and (8)

Option 1

44. The Working Group may wish to consider whether the terms "communication" and "electronic communication" could be consolidated, as set out in option 1, and further discussed at paras. 6-7 above. The definition contained in option 1 captures the need to ensure that (i) "communication" is defined as broadly as possible to capture any form of communication that may take place under the Rules; and (ii) all communication under the Rules is electronic in form. The definition in option 1 also conforms with the definitions of communication and electronic communication in the Electronic Communications Convention.

Option 2

45. The definitions in option 2 as set out in paragraphs (7) and (8) derive from article 4 of the Electronic Communications Convention, but the Working Group may wish to consider whether those definitions adequately serve the intention of the Rules that all communications in the course of proceedings are made electronically via the platform. The phrase "electronic format" has been substituted for "digital format" in paragraph (8) in order to provide as technology-neutral a definition as possible. Should the Working Group decide to retain the wording in option 2, it may wish to consider whether it is necessary to include the phrase "so as to be directly processed by a computer or other electronic devices" in paragraph (8).

46. **Draft article 3 (Communications)**

"1. All communications in the course of ODR proceedings shall be communicated to the [ODR provider via the ODR platform designated by the ODR provider]/[ODR administrator]. [The electronic address of the ODR platform/administrator to which documents must be submitted shall be specified in the dispute resolution clause.]

"2. The designated electronic address of the claimant for the purpose of all communications arising under the Rules shall be that notified by the claimant to the ODR provider under paragraph (2) and as updated to the ODR provider at any time thereafter during the ODR proceedings (including by specifying an updated electronic address in the notice, if applicable).

"3. The electronic address for communication of the notice by the ODR provider to the respondent shall be that notified by the respondent to the ODR provider under paragraph (2) and as updated to the claimant or ODR provider at any time prior to the issuance of the notice. Thereafter, the respondent may update its electronic address by notifying the ODR provider at any time during the ODR proceedings.

"4. A communication shall be deemed to have been received when, following submission to the ODR provider in accordance with paragraph (1), the ODR provider notifies the parties of the availability thereof in accordance with paragraph (6). The neutral may in his or her discretion extend any deadline in

the event the addressee of any communication shows good cause for failure to retrieve that communication from the platform.

"5. The ODR provider shall promptly communicate acknowledgements of receipt of electronic communications between the parties and the neutral to all parties [and the neutral] at their designated electronic address.

"6. The ODR provider shall promptly notify all parties and the neutral of the availability of any communication at the ODR platform.

"7. The ODR provider shall promptly notify all parties and the neutral of the conclusion of the negotiation stage of proceedings and the commencement of the facilitated settlement stage of proceedings; the expiry of the facilitated settlement stage of proceedings; and, if relevant, the commencement of the recommendation stage of proceedings."

Remarks

General

47. The Working Group may wish to note that the phrase "ODR administrator" has been added by way of alternative to paragraph (1) for illustrative purposes, but that remaining consequential changes throughout the draft would necessarily have to be made should the Working Group determine that that definition (option 3, article 2, paragraphs (2)-(3)) ought to replace separate definitions of ODR providers and ODR platforms.

48. The Working Group may wish to note that the words "may be submitted" in the second sentence of paragraph (1) have been replaced with "must be submitted" to clarify the need for all information to be submitted electronically via the ODR platform or administrator.

49. The Working Group may wish to note that paragraph (2), which provided that "[a]s a condition to using the Rules each party must, [at the time it provides its explicit agreement to submit the disputes relating to the transaction to ODR under the Rules, also] provide its electronic contact information", has been deleted on the basis that it created inconsistency in practice with other provisions in draft article 3.

Electronic address

50. In relation to the use of the term "electronic address" and/or "designated electronic address", the Working Group agreed to consider the definition and meaning of that term in relation to its use in draft articles 3 and 4. The Working Group may wish to consider whether the explanation set out in paragraph 9 above provides further clarity, or whether a definition of the term "electronic address" might be useful.

Paragraph (4)

51. The Working Group may wish to consider whether the second sentence of paragraph (4) would be better placed in draft article 11, in particular in light of article 11(5).

2. Commencement

52. Draft article 4A (Notice)

"1. The claimant shall communicate to the ODR provider a notice in accordance with the form contained in paragraph (4).

"2. [The notice shall be promptly communicated by the ODR provider to the respondent.][The ODR provider shall promptly notify the respondent that the notice is available at the ODR platform.]

Option 1:

["3. ODR proceedings shall [be deemed to] commence when, following communication to the ODR provider of the notice pursuant to paragraph (1), the ODR provider notifies the parties of the availability thereof in accordance with paragraph (2).]

Option 2:

["3. ODR proceedings shall commence when the respondent submits a response pursuant to article 4B accepting the [mediation/conciliation].]

"4. The notice shall include:

"(a) the name and [designated electronic address] of the claimant and of the claimant's representative (if any) authorized to act for the claimant in the ODR proceedings;

"(b) the name and designated electronic address of the respondent and of the respondent's representative (if any) known to the claimant;

"(c) the grounds on which the claim is made;

"(d) any solutions proposed to resolve the dispute;

["(e) a statement that the claimant is not currently pursuing other remedies against the respondent with regard to the specific dispute in relation to the transaction in issue;]

"(f) the location of the claimant;

"(g) the claimant's preferred language of proceedings;

"(h) the signature of the claimant [and/or the claimant's representative] including any other identification and authentication methods.

["5. The claimant may provide, at the time it submits its notice, any other relevant information, including information in support of its claim.]"

Remarks

Paragraph (3)

53. At its twenty-eighth session the Working Group agreed on the need for a provision setting out a clear commencement stage of proceedings, and an additional option was proposed in order to trigger the commencement of proceedings at the time a response was submitted (option 2).

54. The Working Group may wish to consider, in relation to option 2, whether requiring a respondent to lodge a response before proceedings can commence, in practice gives the respondent the right to refuse to enter into ODR proceedings notwithstanding that it had agreed to do so contractually at a previous stage (pursuant to article 1(1)) (see also para. 16 above). In relation to option 2, the Working Group might also wish to consider whether describing Track II proceedings as a "mediation" or "conciliation" accurately describes the multi-stage process encompassed by that track.

55. In relation to option 1, the Working Group may wish to consider whether the square bracketed language "to be deemed" is necessary in light of the requirement of paragraph (3) for parties to be notified, in conjunction with the power of the neutral under article 11(5) to redress any difficulties in relation to receipt of notice (see A/CN.9/795, para. 72).

Paragraph (4)

Subparagraph (a)

56. In relation to subparagraph (a), the Working Group agreed to consider the definition and meaning of "electronic address" both in relation to that subparagraph as well as in relation to draft article 3 (see paras. 9 and 50 above).

57. The Working Group may wish to consider whether representation of parties is appropriate in Track II proceedings (see also draft article 14, and para. 19 of document A/CN.9/WG.III/WP.127/Add.1).

Subparagraph (e)

58. In relation to subparagraph (e), and as further set out in paragraphs 17 and 33 above, the Working Group ought to consider whether Track II proceedings require a stay of other action while those proceedings are underway, and moreover, whether a court or arbitral tribunal would be obliged under its own national legislation to implement such a stay. If the ODR proceedings in Track II are not intended to have a *res judicata* effect, then it is proposed to delete subparagraph (e); if such an effect is intended, the Working Group might wish to consider inserting an undertaking such as that set out in article 16 of the UNCITRAL Conciliation Rules 1980 (see para. 17 above).

Subparagraph (f)

59. In relation to subparagraph (f), it is suggested that the "location" of the claimant is a confusing term and moreover that it does not in any event have relevance for a Track II proceeding (see A/CN.9/795, para. 84, and A/CN.9/739, paras. 78-80).

Subparagraph (h)

60. In relation to subparagraph (h), the term "signature ... in electronic form" has been replaced by "signature", consistent with UNCITRAL texts on e-commerce[12] that provide a functional equivalence rule for signatures.

61. It is moreover proposed that the Working Group further consider the function performed by the claimant's signature requirement. In that respect, it should be noted that a signature may perform multiple functions, and that, in order to establish functional equivalence between electronic signatures and paper-based ones, the electronic signature needs to satisfy two requirements, namely to identify the author, and to ascertain the intention of the author with respect to the signed communication (see article 9(3), Electronic Communications Convention). The Working Group may therefore wish to clarify whether in this case the function of the (electronic) signature is to identify the claimant and to establish a link between the claimant and the claim.

62. At its twenty-eighth session, the Working Group agreed to retain the language "including any other identification and authentication methods" in subparagraph (h) (A/CN.9/795, para. 86). However, it is suggested that that language ought to be deleted in light of the clarifications provided on the signature requirement. Moreover, the current text might be interpreted as restricting electronic signature methods to certain authentication methods such as, for example, the log-in of the parties to the ODR platform.

Paragraph (5)

63. The Working Group agreed at its twenty-eighth session that it was desirable to encourage claimants to submit all relevant information to the extent possible at the time of the notice, but that the provision of such information ought not to be mandatory (A/CN.9/795, para. 92). Consequently, a new paragraph (5) has been inserted to provide for the (non-mandatory) provision of information by the claimant at the time it submits its notice. The following text has been deleted from paragraph (1), to avoid redundancy: "The notice should, as far as possible, be accompanied by all documents and other evidence relied upon by the claimant, or contain references to them."

64. Parallel amendments have been included in draft article 4B, paragraphs (1) and (5).

65. **Draft article 4B (Response)**

> *"1. The respondent shall communicate to the ODR provider a response to the notice in accordance with the form contained in paragraph (3) within [seven (7)] calendar days of being notified of the availability of the notice on the ODR platform.*

[12] See Article 7 of the UNCITRAL Model Law on Electronic Commerce (1996); Article 6 of the UNCITRAL Model Law on Electronic Signatures (2001); and article 9(3) of the Electronic Communications Convention.

"2. The response shall include:

"(a) the name and designated electronic address of the respondent and the respondent's representative (if any) authorized to act for the respondent in the ODR proceedings;

"(b) a response to the grounds on which the claim is made;

"(c) any solutions proposed to resolve the dispute;

["(d) a statement that the respondent is not currently pursuing other remedies against the claimant with regard to the specific dispute in relation to the transaction in issue;]

"(e) the location of the respondent;

["(f) whether the respondent agrees with the language of proceedings provided by the claimant pursuant to article 4A, paragraph 4(g) above, or whether another language of proceedings is preferred,]

["(g) the signature of the respondent and/or the respondent's representative including any other identification and authentication methods].

["5. The respondent may provide, at the time it submits its notice, any other relevant information, including information in support of its response.]"

Remarks

Paragraph (1)

66. The Working Group may wish to note that paragraph (1) will require amendment to maintain consistency with the content, when determined, of article 4A, paragraphs (1)-(3); until that content has been finally determined, the phrase "receipt of the notice" has been replaced by "being notified of the availability of the notice on the ODR platform" in order to improve drafting consistency.

67. **Draft article 4C (Counterclaim)**

"[1. The response to an ODR notice may include one or more counterclaims provided that such counterclaims fall within the scope of the Rules and arise out of the same transaction as the claimant's claim. A counterclaim shall include the information in article 4A, paragraphs (4)(c) and (d).

"2. The claimant may respond to any counterclaim within [seven (7)] calendar days of being notified of the existence of the response and counterclaim on the ODR platform. A response to the counterclaim must include the information in article 4, paragraphs (4)(b) and (c).]"

Remarks

68. Further to the decision of the Working Group at its twenty-eighth session that a separate provision ought to be included in relation to counterclaims and responses thereto, a new draft article 4C has been included.

69. The Working Group may wish to note that deadlines flowing from the notification of the response will also have to accommodate the possibility of a

counterclaim and response thereto as an alternative reference time from which the next stage of proceedings will be triggered.

3. Negotiation

70. Draft article 5 (Negotiation)

Negotiation

Commencement of the negotiation stage

"1. If the response does not include a counterclaim, the negotiation stage shall commence upon communication of the response to the ODR provider, and notification thereof to the claimant. If the response does include a counterclaim, the negotiation stage shall commence upon communication of the response by the claimant to that counterclaim and notification thereof to the respondent, or after the expiration of the response period set out in article 4C, paragraph (2), whichever is earlier.

"2. The negotiation stage of proceedings shall comprise negotiation between the parties via the ODR platform.

Commencement of the facilitated settlement stage

"3. If the respondent does not communicate to the ODR provider a response to the notice in accordance with the form contained in article 4B, paragraph (3) within the time period set out in article 4B, paragraph (1), or where one or both parties request that the process move to the facilitated settlement stage of proceedings, or a party elects not to engage in the negotiation stage of proceedings, then the facilitated settlement stage of ODR proceedings shall immediately commence.

"4. If the parties have not settled their dispute by negotiation within ten (10) calendar days of the commencement of the negotiation stage of proceedings, the facilitated settlement stage of ODR proceedings shall immediately commence.

Extension of time

"5. The parties may agree to a one-time extension of the deadline for reaching settlement. However no such extension shall be for more than ten (10) calendar days."

Remarks

71. The Working Group may wish to note that a paragraph in relation to settlement has been moved to a separate article — draft article 8 — to reflect the agreement of the Working Group on the principle that settlement could be achieved not only at a negotiation stage, but at any stage of proceedings (A/CN.9/795, para. 122).

Paragraphs (1) and (2)

72. Paragraph (1) has been slightly modified to accommodate deadlines flowing from both a response stage, and, if applicable, a counterclaim stage.

73. Paragraph (1) has been slightly modified, and a new paragraph (2) added, to reflect more clearly the commencement of negotiation, and the content of that stage. The phrase "including, where appropriate, the communication methods available on the ODR platform" in paragraph (1) has been replaced by "... via the ODR platform", to clarify that all negotiation within the context of Track II proceedings ought to take place via the ODR platform. While it might be desirable as a matter of policy for the parties to communicate outside that platform should that communication achieve a settlement, any communication outside the platform would fall outside of the relevant ODR Track II proceeding.

Paragraphs (3) and (4)

74. Paragraphs (3) and (4) have been slightly modified in order more clearly to define the consequences of failing to submit a response; or agreeing or electing to move to the next stage of proceedings (facilitated settlement).

75. The draft set out in paragraph 70 above links the end of a negotiation stage with the beginning of a facilitated settlement stage, whereas previously it had been linked to the appointment of a neutral, but not to the next stage of proceedings.

76. Consequent to that modification, draft article 6 in relation to facilitated settlement has been modified to link the commencement of the facilitated settlement stage with the appointment of a neutral. It is suggested that such a chronology more clearly sets out the various stages of the process and the actions associated with each stage of proceedings. The Working Group may wish to consider whether paragraphs (3) and (4) would be better situated at the beginning of draft article 6.

4. Facilitated settlement

77. **Draft article 6 (Facilitated settlement)**

"1. Upon commencement of the facilitated settlement stage of ODR proceedings, the [ODR provider/platform/administrator] shall promptly appoint a neutral in accordance with article 9 and shall notify the parties thereof in accordance with article 9(1).

"2. Following appointment, the neutral shall communicate with the parties to attempt to reach a settlement agreement.

"3. If the parties have not settled their dispute by facilitated settlement within ten (10) calendar days of being notified of the appointment of the neutral pursuant to article 9(1) (the 'expiry of the facilitated settlement stage'), the final stage of proceedings shall commence pursuant to article 7 (Recommendation by a neutral)."

Remarks

Paragraph (1)

78. Paragraph (1) has been included in order to clarify the process following commencement of the facilitated settlement stage (see also paras. 74-76 above).

Paragraph (2)

79. Further to the agreement of the Working Group that settlement provisions ought to be the subject of a discrete article applicable to any stage of proceedings (see para. 71 above, and A/CN.9795. paras. 121-122), the following sentence has been deleted from paragraph (2) as redundant with new draft article 8: "If the parties reach a settlement agreement, then such settlement agreement shall be recorded on the ODR platform, at which point, the ODR proceedings will automatically terminate."

80. The words "Following appointment" have been inserted at the beginning of paragraph (2) in order to improve clarity.

Paragraph (3)

81. Paragraph (3) has been slightly modified to ensure consistency with the modifications made to draft article 5 in relation to the commencement of the next stage of proceedings.

5. Recommendation

82. **Draft article 7 (Recommendation by a neutral)**

"1. At the expiry of the facilitated settlement stage, the neutral shall proceed to communicate a date to the parties for any final communications to be made. Such date shall be not later than ten (10) calendar days from the expiry of the facilitated settlement stage.

"2. Each party shall have the burden of proving the facts relied on to support its claim or defence. The neutral shall have the discretion to reverse such burden of proof where, in exceptional circumstances, the facts so require.

"3. The neutral shall, within fifteen (15) calendar days of the expiry of the facilitated settlement stage, evaluate the dispute based on the information submitted by the parties, and having regard to the terms of the agreement, and shall make a recommendation in relation to the resolution of the dispute. The ODR provider shall communicate that recommendation to the parties and the recommendation shall be recorded on the ODR platform.

"4. The recommendation shall not be binding on the parties unless they otherwise agree. [However, the parties are encouraged to abide by the recommendation and the ODR provider may introduce the use of trustmarks or other methods to identify compliance with recommendations.]"

Remarks

Paragraph (1)

83. The Working Group may wish to note that some slight drafting modifications have been made to paragraph (1) to promote clarity of drafting and consistency with other provisions in the Rules.

Paragraph (2)

84. The Working Group may wish to consider whether paragraph (2) is necessary or appropriate in the context of Track II proceedings. It is suggested that "burden of proof" is a legal concept that touches upon both procedural and substantive matters depending on the context and the jurisdiction, and that including a provision on burden of proof in procedural rules the outcome of which is a non-binding determination by a neutral may unnecessarily increase the complexity of proceedings.

Paragraph (3)

85. Several minor modifications have been made in relation to the drafting of paragraph (3), specifically: (i) a deadline has been inserted for the rendering of a "recommendation"; (ii) the phrase "on the terms of the contract" has been replaced with "having regard to the terms of the agreement", in accordance with the way that term is described in the preamble and in article 1; and (iii) the words "in relation to the resolution of the dispute" have been added after the word "recommendation", in order to clarify the object and purpose of the recommendation.

86. The deadline now referred to in paragraph (3) is linked to the deadline in paragraph (1), in order to give the neutral a minimum of five days after the submission of any final information by the parties to render a decision. The Working Group may wish to consider whether the deadlines in paragraphs (1) and (3) are suitable.

Paragraph (4)

87. It is proposed that paragraph (4) could be better placed in commentary or guidelines. In that respect, language has been inserted in document A/CN.9/WG.III/WP.128.

6. Settlement

88. **Draft article 8 (Settlement)**

"If settlement is reached at any stage of the ODR proceedings, the terms of such settlement shall be recorded on the ODR platform, at which point, the ODR proceedings will automatically terminate."

Remarks

General

89. Pursuant to the decision of the Working Group that settlement ought to be provided for at any time during ODR proceedings, a discrete provision on settlement has been included in draft article 8 (A/CN.9/795, para. 121-122; see also para. 71 above).

90. The Working Group may wish to consider whether guidelines ought to provide further information in respect of how a settlement ought to be recorded, and whether that process ought to be different prior to the appointment of a neutral, and after the appointment of a neutral (see A/CN.9/795, para. 120).

91. The Working Group may further wish to consider any technical aspects regarding formation of settlement agreements, including whether a separate provision on disputes arising out of the settlement might be required in this respect (see A/CN.9/WG.III/WP.119/Add.1, para. 13).

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Online dispute resolution for cross-border electronic commerce transactions: draft procedural rules

Note by the Secretariat

Addendum

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II. Online dispute resolution for cross-border electronic commerce transactions: draft procedural rules

B. Notes on draft procedural rules

8. Neutral

1. Draft article 9 (Appointment of neutral)

"1. The ODR [provider/platform/administrator] shall appoint the neutral promptly following commencement of the facilitated settlement stage of proceedings. Upon appointment of the neutral, the ODR provider shall promptly notify the parties of the name of the neutral and any other relevant or identifying information in relation to that neutral.

"2. The neutral, by accepting appointment, confirms that he or she can devote the time necessary to conduct the ODR proceedings diligently, efficiently and in accordance with the time limits in the Rules.

"3. The neutral shall, at the time of accepting his or her appointment, declare his or her impartiality and independence. The neutral, from the time of his or her appointment and throughout the ODR proceedings, shall without delay disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence to the ODR provider. The ODR provider shall promptly communicate such information to the parties.

Objections to the appointment of a neutral

"4. Either party may object to the neutral's appointment within [two (2)] calendar days (i) of the notification of appointment without giving reasons therefor; or (ii) of a fact or matter coming to its attention that is likely to give rise to justifiable doubts as to the impartiality or independence of the neutral, setting out the fact or matter giving rise to such doubts, at any time during the ODR proceedings.

"5. Where a party objects to the appointment of a neutral under paragraph (4)(i), that neutral shall be automatically disqualified and another appointed in his or her place by the ODR provider. Each party shall have a maximum of [three (3)] challenges to the appointment of a neutral following each notice of appointment, following which the appointment of a neutral by the ODR provider will be final, subject to paragraph (4)(ii). Alternatively if no challenges are made within two (2) days of any notice of appointment, the appointment will become final, subject to (4)(ii).

"6. Where a party objects to the appointment of a neutral under paragraph (4)(ii), the ODR provider shall make a determination within [three (3)] calendar days, regarding whether that neutral shall be replaced.

"7. In the event both parties object to the appointment of a neutral under paragraph (4)(i) or (4)(ii), that neutral shall be automatically disqualified and another appointed in his or her place by the ODR provider, notwithstanding the number of challenges that has been made by either party.

Objections to provision of information

"8. Either party may object, within three (3) calendar days of the final appointment of the neutral, to the provision by the ODR provider to the neutral of information generated during the negotiation stage. Following the expiration of this three-day period and in the absence of any objections, the ODR provider shall convey the full set of existing information on the ODR platform to the neutral.

Number of neutrals

"9. The number of neutrals shall be one."

Remarks

Paragraph (1)

2. Further to the agreement of the Working Group at its twenty-eighth session that some basic information in relation to a neutral ought to be provided to the parties, but that the provision of that information ought not unduly to burden the ODR provider (A/CN.9/795, para. 128), language providing for additional identifying information in respect of a neutral has been included in paragraph (1) for the consideration of the Working Group.

3. The following sentence has been inserted at the beginning of paragraph (1) to improve clarity of drafting and to reflect draft article 7(1): "*The ODR provider shall appoint the neutral promptly following commencement of the facilitated settlement stage of proceedings.*"

4. The Working Group may wish to note that the terms "ODR platform" and "ODR administrator" have been added by way of alternative to paragraph (1) for illustrative purposes, but that remaining consequential changes in draft article 9 would necessarily have to be made subject to the determination of the Working Group in relation to draft article 2, paragraphs (2)-(3).

Paragraph (2)

5. Paragraph (2) has been modified to reflect the discussions of the Working Group at its twenty-eighth session, and mirrors the language in the second model statement to article 11 set out in the Annex to the UNCITRAL Arbitration Rules 2010 (A/CN.9/795, paras. 130-132).

Paragraph (6)

6. The residual discretion left to an ODR provider under paragraph (6) may require further guidance, either in guidelines or in the Rules themselves. In that respect, language has been inserted in document A/CN.9/WG.III/WP.128.

Paragraph (7)

7. Paragraph (7) reflects the agreement of the Working Group at its twenty-eighth session to reflect in article 9 the principle that where both parties object to the appointment of a neutral, that neutral ought to be replaced without any decision-making on behalf of the provider (A/CN.9/795, para. 136).

8. **[Draft article 10 (Resignation or replacement of neutral)**

"If the neutral resigns or otherwise has to be replaced during the course of ODR proceedings, the ODR provider through the ODR platform shall appoint a neutral to replace him or her pursuant to article 9. The ODR proceedings shall resume at the stage where the neutral that was replaced ceased to perform his or her functions.]"

9. **Draft article 11 (Power of the neutral)**

"1. Subject to the Rules, the neutral may conduct the ODR proceedings in such manner as he or she considers appropriate.

"1 bis. The neutral, in exercising his or her functions under the Rules, shall conduct the ODR proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the dispute. In doing so, the neutral shall remain at all times wholly independent and impartial and shall treat both parties equally.

"2. Subject to any objections under article 9, paragraph (8), the neutral shall conduct the ODR proceedings on the basis of all communications made during the ODR proceedings.

"3. At any time during the proceedings the neutral may request or allow the parties (upon such terms as to costs and otherwise as the neutral shall determine) to provide additional information, produce documents, exhibits or other evidence within such period of time as the neutral shall determine.

["4. The neutral shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence or validity of any agreement to refer the dispute to ODR. For that purpose, the dispute resolution clause shall be treated as an agreement independent of the other terms of the agreement. A determination by the neutral that the contract is null shall not automatically entail the invalidity of the dispute resolution clause.]

"5. Where it appears to the neutral that there is any doubt as to whether the respondent has received the notice under the Rules, the neutral shall make such inquiries or take such steps as he or she deems necessary to satisfy himself or herself with regard to such receipt, and in doing so may where necessary extend any time period provided for in the Rules. [As to whether any party has received any other communication in the course of the ODR proceedings, the neutral may make such inquiries or take such steps as he or she deems necessary to satisfy himself or herself with regard to such receipt, and in doing so, may, where necessary, extend any time period provided for in the Rules.]"

Remarks

Paragraph (1)

10. The square bracketed "[and the Guidelines and Minimum Requirements for ODR Neutrals]" following the words "subject to the Rules" has been deleted, on the basis that the legal nature and addressees of the Rules and of supplementary guidelines differ, and the former ought not to be incorporated by reference into the latter (see A/CN.9/WG.III/WP.127, para. 28, and A/CN.9/WG.III/WP.128).

Paragraph (2)

11. The Working Group may wish to note that some slight drafting modifications have been made to paragraph (2) to maintain consistency with other provisions in the Rules.

Paragraph (4)

12. The language in paragraph (4) has been slightly modified to improve clarity, including the substitution of the word "agreement" for "contract" in the second sentence, in accordance with the way that term is set out in the preamble and paragraph (1).

13. The Working Group may wish to consider whether a traditional competence-competence and severability provision is necessary or appropriate in the context of Track II proceedings.

14. In any event, as identified by the Working Group at its twenty-eighth session, the requirement in draft article 1, paragraph (1)(bis), for the parties to agree to ODR proceedings in an agreement separate from the transaction, is potentially confusing when read alongside paragraph (4) (A/CN.9/795, para. 145).

9. General provisions

15. Draft article 12 (ODR provider)

"[The ODR provider/platform/administrator shall be specified in the dispute resolution clause.]"

Remarks

16. The Working Group may wish to consider, in relation to draft article 12: (i) if an entity administering the dispute ought to be specified in the dispute resolution clause; (ii) if so, which of the entities involved in administering the dispute (provider/platform/administrator) ought that to be; and (iii) whether the Rules ought to mandate such specification, or whether the requirement to specify might better be placed in guidelines.

17. Draft article 13 (Language of proceedings)

"[1. Subject to an agreement by the parties, the neutral shall, promptly after its appointment, determine the language or languages to be used in the proceedings[, having regard to the parties' due process rights under article [x]].

"2. All communications, with the exception of any communications falling under paragraph (3) below, shall be submitted in the language of the proceedings (as agreed or determined in accordance with this article), and where there is more than one language of proceedings, in one of those languages.

"3. Any documents attached to the communications and any supplementary documents or exhibits submitted in the course of the ODR proceedings may be submitted in their original language, provided that their content is undisputed.

"4. When a claim relies on a document or exhibit whose content is disputed, the neutral may order the party serving the document or exhibit to provide a translation of that document into [a language which the other party understands] [the other language of the proceedings] [failing which, the language the other party included in its notice or response as its preferred language]]."

18. **Draft article 14 (Representation)**

"A party may be represented or assisted by a person or persons chosen by that party. The names and designated electronic addresses of such persons [and the authority to act] must be communicated to the other party by the ODR provider."

Remarks

19. The Working Group may wish to consider whether representation is necessary or appropriate in Track II proceedings.

20. **Draft article 15 (Exclusion of liability)**

"[Save for intentional wrongdoing, the parties waive, to the fullest extent permitted under the applicable law, any claim against the ODR provider and neutral based on any act or omission in connection with the ODR proceedings under the Rules.]"

21. **Draft article 16 (Costs)**

"[The neutral shall make no [decision] [award] as to costs and each party shall bear its own costs.]"

Remarks

22. The Working Group may wish to consider whether a costs provision is necessary or appropriate in Track II proceedings.

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Online dispute resolution for cross-border electronic commerce transactions: draft guidelines

Note by the Secretariat

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I. Introduction

1. At its forty-third session (New York, 21 June-9 July 2010), the Commission established a Working Group to undertake work in the field of online dispute resolution (ODR) and agreed that the form of the legal standard to be prepared should be decided after further discussion of the topic.[1]

2. At its twenty-second session (Vienna, 13-17 December 2010), Working Group III commenced its consideration of the topic of ODR and requested that the Secretariat prepare (inter alia) draft generic procedural rules for ODR in respect of business-to-business, and business-to-consumer disputes arising out of cross-border, low-value, high-volume transactions (A/CN.9/716, para. 115). At that session, the Working Group requested that the scope of application of the Rules clarify that the Rules were intended to be used as part of an ODR framework, consisting (inter alia) of one document setting out "guidelines for ODR providers and arbitrators", and another "minimum requirements for ODR providers and arbitrators, including common communication standards and formats and also including accreditation and quality control" (A/CN.9/721, paras. 52 and 140).

3. Notwithstanding various amendments to the title of those documents, the preamble of the Rules as contained in documents A/CN.9/WG.III/WP.123 (Track I), and A/CN.9/WG.III/WP.127 (Track II) refers to a dispute resolution framework that consists of (inter alia) the following documents: "guidelines and minimum requirements for online dispute resolution providers/platforms/administrators"; and "guidelines and minimum requirements for neutrals".

4. At its twenty-eighth session, the Working Group mandated the Secretariat to prepare draft guidelines for the various actors involved in facilitating or undertaking the Rules (A/CN.9/795, para. 57). This note consequently aims to provide an outline of the guidance that might be practicable, bearing in mind the types of documents listed in the preamble of the Rules as contained in documents A/CN.9/WG.III/WP.123 (Track I), and A/CN.9/WG.III/WP.127 (Track II). Such outline does not address the form such guidance may take, and in particular whether it would best take the form of general principles (see, for example, the Proposal of the Canadian delegation on principles applicable to online dispute resolution providers and neutrals, set out in document A/CN.9/WG.III/WP.114), or whether it ought to provide more detailed guidance as to how to achieve those principles.

5. Furthermore, this note does not set out "minimum requirements" for the relevant entities in the ODR process (see Preamble, Track II, document A/CN.9/WG.III/WP.127). The Working Group may wish to consider whether such requirements ought to be specified in guidelines, or whether principles set out in guidelines can be implemented according to ODR providers' own requirements.

6. As set out in further detail below, preliminary questions that the Working Group might wish to consider include: (i) the purpose of the guidelines; (ii) the relationship of the guidelines with the Rules; (iii) the intended stakeholders to which the guidelines are addressed; and (iv) the format the guidelines ought to take.

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[1] *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17* (A/65/17), para. 257.

II. Draft content of guidelines for ODR providers/platforms/ administrators

A. General

Purpose of guidelines and relationship with the Rules

7. The Working Group may wish to consider (i) the purpose of guidelines that address various stakeholders in the online dispute resolution process, and, bearing in mind that purpose, (ii) the relationship of the guidelines with the Rules. Document A/CN.9/WG.III/WP.114 suggested that guidelines ought to set out best practices for ODR providers and neutrals, while the Rules aim to establish a procedure for online dispute resolution.

8. In that context, and as further set out at paragraph 28 of document A/CN.9/WG.III/WP.127 and paragraph 10 of document A/CN.9/WG.III/WP.127/Add.1, it may be advisable not to annex guidelines to the Rules, as the legal nature and addressees of Rules and guidelines differ.

Stakeholders to whom guidelines are directed

9. At its twenty-eighth session the Working Group provided proposals in relation to the definition in the Rules of ODR providers and ODR platforms, and an alternative proposal that would provide simply for an ODR administrator, the precise definition of which would be determined, but the purpose of which term would be to define a "centralized" entity in the Rules that would maintain claimant-facing contact and responsibility for both the legal and technical elements of a dispute (see A/CN.9/795, paras. 56-57; see also A/CN.9/WG.III/WP.127, paras. 10-13, 42).

10. It is suggested that a single, simple set of guidelines ought to be addressed to the ODR platform/provider/administrator, to permit a flexible evolution of the ODR system such that guidelines would not be quickly rendered obsolete. For the purposes of this note, the word "administrator" is used to address both entities without prejudice to any decision the Working Group might take in relation to defining that entity in the Rules.

11. This note sets out draft guidance in relation to ODR administrators in section B below. Guidance to neutrals is not addressed in this note; moreover the Working Group may wish to consider whether existing guidelines in relation to the conduct of arbitrators and mediators, such as those promulgated by CIArb, IBA and various arbitral institutions, provide sufficient guidance in relation to the conduct of neutrals, and could be referred to in a simple guidance document, or whether UNCITRAL should embark on further defining the principles in relation to the conduct of neutrals.

12. The Working Group may wish to consider formulating guidelines for merchants, in addition to guidelines for actors within the ODR system. Merchants will play a critical role in using and promoting the ODR system and providing information to purchasers in relation to that merchant's use of an ODR system.

Content of guidelines

13. In considering the content of guidelines, the Working Group may wish to have regard to documents A/CN.9/WG.III/WP.110 and A/CN.9/WG.III/WP.114, which have addressed possible elements of such guidelines.

14. The Working Group may also wish to have regard to existing guidelines and protocols in the field of alternative dispute resolution and online dispute resolution. A number of these are listed on the UNCITRAL website,[2] as well as at paragraph 32 of document A/CN.9/716, which list is replicated here for ease of reference: American Bar Association Task Force on E-commerce and ADR, Recommended best practices for online dispute resolution service providers;[3] Final Report and Recommendations of the American Bar Association's Task Force on Electronic Commerce and Alternative Dispute Resolution, Addressing Disputes in Electronic Commerce;[4] Alternative Dispute Resolution Guidelines Agreement reached between Consumers International and the Global Business Dialogue on Electronic Commerce;[5] European Commission Recommendation 98/257/EC of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes;[6] and European Commission Recommendation of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes not covered by Recommendation 98/257/EC.[7]

15. This note does not distinguish between guidelines for ODR proceedings ending in a non-binding stage, and ODR proceedings that end in a binding arbitration stage, although the Working Group may wish to consider whether additional guidance would be appropriate for proceedings involving an arbitration. Nor does this note distinguish between guidance for disputes arising out of B2B transactions as opposed to B2C transactions, but it is suggested that general guidance would be equally relevant to both.

B. Proposed topics to be addressed in draft guidelines

16. Draft guidelines for ODR providers, platforms or administrators might address, inter alia, the following topics.

Fair process and independence

Fair process

17. The guidelines ought to emphasise, by way of basic principles, that all disputing parties in the ODR proceedings are entitled to a fair ODR process.

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[2] www.uncitral.org/uncitral/publications/online_resources_ODR.html.
[3] www.abanet.org/dispute/documents/BestPracticesFinal102802.pdf.
[4] www.abanet.org/dispute/documents/FinalReport102802.pdf.
[5] www.gbd-e.org/pubs/ADR_Guideline.pdf.
[6] COM (1998) 198 final — Official Journal L 115 of 17.4.1998.
[7] COM (2001) 161 — Official Journal L 109 of 19.4.2001.

Neutrality and independence of ODR providers, platforms and neutrals

18. Guidelines could underline the principle of neutrality of the various stakeholders in the ODR process, and establish clear procedures in relation to challenges to neutrality (see A/CN.9/WG.III/WP.114, Principles 2 and 3).

Modification of the Rules and logos

Modification of the Rules

19. Guidelines might address the possibility of ODR administrators modifying the Rules in relation to minor logistical points (for example, modifying timelines set out in the Rules), and/or in relation to more fundamental modifications (for example, offering only a Track I or a Track II proceeding, but not both). Guidelines might wish to address the desirability of any consequential amendments to the title or marketing of the Rules further to any such modifications being made.

20. Guidelines could clarify that the Rules, in the form used by the ODR provider, ought to be clearly and easily available on the ODR provider's website.

United Nations logo

21. It is suggested that guidelines ought to address the fact that whilst an administrator would in no circumstances be entitled to use the UNCITRAL or other United Nations logo to promote its use of the Rules, it would be able to state that it is using the UNCITRAL ODR Rules as a basis for its dispute resolution procedure (see para. 12, document A/CN.9/WG.III/WP.124).

22. The Working Group might wish to bear in mind that no oversight mechanism exists within the system being designed in relation to the work and functioning of ODR administrators, although as set out in paragraph 13 of document A/CN.9/WG.III/WP.124, private or government entities might decide to take on such an oversight role.

Transparency/publication/disclosure

Publication of information relating to operational matters

23. Principle 4 of document A/CN.9/WG.III/WP.114 proposes that the ODR provider "shall publish, on its website, [clear, comprehensible, and accurate information, including] its fees, ODR procedures, potential recourses against decisions, enforcement procedures, complaint handling processes against the ODR provider or neutral and practices regarding the treatment of information. This information is brought expressly to the attention of users prior to their acceptance of the ODR process."

24. In addition to those categories of information, the Working Group also may wish to consider that the ODR administrator ought to make public and easily accessible: (i) lists of neutrals and information in relation to its neutrals; (ii) a breakdown of fees and costs it charges to parties; and (iii) any financial relationship between the administrator (or ODR provider or platform specifically) and merchants; (iv) ODR administrators' data protection and privacy policies; (v) the language or languages in which the proceedings can be conducted by that ODR administrator; (vi) the content of rules it is using, whether those be the UNCITRAL

ODR Rules or a modified version thereof; and (vi) the time frame for each stage of proceedings. Many of these matters are addressed further below.

Statistics and/or other information about the award

25. The Working Group may wish to consider what type of information in respect of recommendations and awards the ODR provider ought to be encouraged to make public. The Working Group has previously considered whether it would be desirable or practical for the ODR administrator to publish awards, with due exclusion of identifying information of parties; or to publish the reasoning set out in awards (see A/CN.9/739, para. 135, A/CN.9/762, para. 39; see also Principle 7 of A/CN.9/WG.III/WP.114).

26. The Working Group has also considered whether, and likely as an alternative, statistics ought to be aggregated on an anonymous basis and published per ODR provider (A/CN.9/769, para. 98). It has also been suggested that the publication of statistics and summaries of decisions in relation to ODR proceedings was a matter to be addressed in a document setting out guidelines for ODR providers (A/CN.9/769, para. 98). It is suggested that, at least for Track II proceedings, the publication of statistics, rather than any detailed publication of recommendations or the reasoning therein, would be a more useful metric for consumer or other public reference.

27. If the Working Group decides that publication of statistics is desirable, it may wish to consider what types of statistics ought to be published, bearing in mind both benefit to the public and the burden to the ODR administrator of so publishing these. Examples of what such statistics might address include: number of disputes solved in favour of sellers/purchasers; the average time for resolving a dispute; and the percentage of cases resolved at the first, second or third stage of proceedings.

28. Guidelines might provide that statistics ought to be published at a certain frequency and in a way that permits easy inspection by the public.

Contracts and relationships with other entities in the process

29. An area that might warrant consideration in guidelines for ODR administrators is whether the existence, and possibly the content, of any contract or financial relationship it maintains with merchants, be made publicly available.

30. The Working Group may also wish to consider whether the relationship between an ODR provider and an ODR platform (and the nature of that relationship: e.g., contractual, or whether the ODR provider and platform form part of the same entity) ought to be specified. Information that might be made publicly accessible could include which entity is responsible for which elements of the online proceeding; the Working Group will recall that it discussed that issue in the context of liability of an ODR platform or provider for the conduct towards end-users (see A/CN.9/WG.III/WP.127, para. 12; A/CN.9/795, para. 53).

Relationship with neutrals

31. Guidance might be provided as to an ODR administrator's relationship with neutrals, including guidance in relation to selection practices, methods of ensuring neutrals' neutrality, and the qualifications required of a neutral, as well as the need

to ensure transparency of its standards in this respect. The Working Group suggested at its twenty-seventh session that guidance for ODR providers could address issues of timeliness of neutral decision-making including, for example, replacement of the neutral should he or she fail to undertake his or her duties in a timely way (see A/CN.9/769, para. 96).

32. In relation to an ODR administrator's selection of neutrals, the draft Rules no longer require neutrals to be selected from a qualified list maintained by an ODR provider, but the Working Group considered that as ODR administrators might maintain such lists in practice, that the guidelines might wish to address such lists (A/CN.9/795, para. 126), and in particular, whether the names and identifying information of each neutral and any other relevant information in relation to that neutral (see also draft article 9 of the Rules as contained in paragraph 8 of document A/CN.9/WG.III/WP.127/Add.1). The Working Group may wish to consider, however, whether providing such information publicly would in practice be of assistance to users of online dispute resolution processes.

Confidentiality, processing and transfer of information, data security, and archiving

33. The Working Group may wish to consider how guidelines ought to address issues of confidentiality and data protection (A/CN.9/795, para. 123). Guidelines might also address the need for an ODR administrator to provide robust data security.

34. The Working Group may wish to consider how the processing of data ought to be addressed in the guidelines, in particular in relation to confidentiality, any transfer of data to other entities, and the availability of information in relation to the ODR provider or platform's policies in respect of such data processing.

35. Guidelines may outline the length of time ODR administrators ought to retain information, and the question of automatic deletion of data after a certain period of time.

Detail in relation to administering disputes under the Rules

Meaning of certain terms in the Rules applicable to ODR providers

36. The guidelines might address the meaning of non-specific phrases in the Rules — for example, the Rules provide for an ODR provider "promptly" to communicate acknowledgement of receipt of communications (draft article 3(6)) and to notify parties of the existence of certain communications on the platform.

37. In relation to the term "low-value", which has not been defined in the Rules or the commentary thereto the Working Group may wish to consider whether the Guidelines ought to provide generic guidance as to the meaning of that term, or whether it ought simply to provide discretion to ODR providers/administrators to set specific thresholds for disputes administered by them (see A/CN.9/739, para. 16; A/CN.9/795, paras. 25-26).

Receipt of communications in the proceedings by disputing parties

38. The Rules currently address receipt/deemed receipt, and the ability of the neutral to extend certain deadlines should it have reason to believe a communication has not been received.

39. The Working Group has previously considered whether the detail of receipt might be a matter best addressed in guidelines, including in relation to automatic acknowledgements of receipt via a platform (A/CN.9/739, para. 57). The Working Group may also wish to have regard to article 15 of the UNCITRAL Model Law on Electronic Commerce, article 10 of the United Nations Convention on the Use of Electronic Communications in International Contracts, and paragraph 183 of the explanatory note to the latter convention.

Timelines

40. Guidelines might provide detail as to the meaning of deadlines specifying "days" or "calendar days" when parties are based in different jurisdictions or time zones.

Residual authority (See also A/CN.9/WG.III/WP.110, para. 14)

41. The Working Group may wish to provide guidance as to both the extent of residual authority vested in an ODR provider, as well as, possibly, guidance on the exercise of that authority. For example, under draft article 9, paragraph (6) (of Track II proceedings, as set out in paragraph 8 of document A/CN.9/WG.III/WP.127/Add.1), where a party objects to the appointment of a neutral, the ODR provider "shall make a determination ... regarding whether that neutral shall be replaced." The Working Group may wish to consider whether, if the ODR provider is to have such residual authority, guidance is enumerated in relation to the exercise of that discretion.

Guidance to parties by an ODR provider

42. The Working Group may wish to consider whether guidelines ought to encourage ODR administrators to provide guidance to the parties to a dispute in relation to the functioning of the Rules, whether in the form of "FAQs", support hotlines, or otherwise.

43. Such party-directed information might also set out deadlines for each stage of proceedings, matters related to costs, the format in which to submit supporting evidence, enforcement of settlement agreements, recommendations by a neutral and awards by a neutral.

44. The Working Group has also suggested that an ODR administrator ought to communicate specific upcoming deadlines to parties as ODR proceedings are ongoing, to ensure that parties would be duly notified of deadlines under the Rules (A/CN.9/795, para. 110).

Compliance or "private enforcement" mechanisms

45. The Working Group may wish to consider, after determination of how the Rules ought to address compliance mechanisms (see A/CN.9/WG.III/WP.124; and para. 87 of document A/CN.9/WG.III/WP.127), the type of guidance the guidelines could usefully provide in that respect.

46. Document A/CN.9/WG.III/WP.114 proposes, as its Principle 11, "[t]he ODR provider shall take measures to encourage compliance with ODR decisions, which may include: requiring that a security be posted; seeking undertakings to comply from the [disputing] parties at the outset of the ODR process; or facilitating payments of awards".

47. The Rules in draft article 7(4) set out a similar principle, notably that "parties are encouraged to abide by the recommendation" made by the neutral, "and the ODR provider may introduce the use of trustmarks or other methods to identify compliance with recommendations." The Working Group might consider whether such encouragement to parties, and the ability of the ODR provider to introduce the use of trustmarks or other compliance methods, may be better placed in guidance to the ODR provider, or even in guidance to parties by an ODR provider (see paras. 42-44 above).

Technical issues

Technology

48. Guidelines may set out a best practice requirement for the platform to be accessible at all times, 24 hours a day, 7 days a week, 365 days a year, save for scheduled maintenance periods. Guidelines may set out corresponding extension of deadlines during maintenance periods.

49. The Working Group may wish to consider whether other technology issues or requirements should be addressed in guidelines and/or the extent to which such issues ought or are able to be prescribed.

Technical problems

50. Guidelines might address matters relating to disruption of proceedings caused by technical problems, and how to maintain the integrity of proceedings and fairness to the disputing parties in such an exigency.

Legal issues arising in the context of administering a dispute resolution

51. The Working Group may wish to consider whether the Guidelines ought to address issues of procedure only, or whether they ought also to address legal issues that might arise in the context of administering online disputes. Such issues might include:

(i) Whether, if a respondent does not participate in proceedings and a recommendation or award is issued in default, any additional steps need to be taken to ensure the respondent has been made aware of the proceedings against it;

(ii) How a settlement agreement ought to be recorded on the platform, and whether that process ought to be different prior to the appointment of a neutral, and after the appointment of a neutral (A/CN.9/WG.III/WP.127, para. 75);

(iii) Whether the place of the ODR administrator has any bearing on the ODR proceedings (analogous to a "seat" of arbitration).

52. The Working Group may wish to consider whether issues likely to be governed by national, regional or international law, such as limitation or prescription periods,

and data protection and privacy, ought to be addressed in guidelines, and if so, to what level of detail.

Language

53. The Working Group may wish to provide guidance to an ODR administrator in relation to language issues, including the need to make transparent the languages in which its services are offered (see Principle 8 of A/CN.9/WG.III/WP.114; see also A/CN.9/762, para. 71) and/or the need to ensure that its system, and neutrals are sensitive to the different language needs of its users (see A/CN.9/762, para. 74).

Fees

54. Guidelines could set out a general principle that fees and costs of the ODR process must be reasonable and transparent. In light of the global nature of the Rules and their applicability to different regions and different types of disputes (business-to-business and business-to-consumer), the Working Group may wish to consider the extent to which further guidance is desirable or possible in relation to fees and costs charged by an ODR administrator.